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No. 86-597

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNION GAS COMPANY, Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA, Respondent

PETITIONER'S REPLY BRIEF

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The question in this Eleventh Amendment case is whether Congress has clearly expressed its intent to impose liability on the states. After the decision of the Third Circuit and the filing of this petition, the statute at issue—the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)—was extensively revised. Superfund Amendments and Reauthorization of 1986, Pub. L. No. 99-499 (October 17, 1986).

The CERCLA Amendments make boldly clear the Congressional intent which only one Circuit Judge had perceived before: states are liable to the same extent as private individuals. The statutory definition of "owner or operator" now provides: "[A]ny state or local government which has caused or contributed to the release or threatened release of a hazardous substance . . . shall be subject to the provisions of this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity." CERCLA §101(20), 42 U.S.C. §9601(20) as amended (see

Cong. Rec. H.9033). The only exception provided by Congress is where states acquire property involuntarily.

Union Gas shares the views expressed by the United States as *amicus curiae*: "This new legislation . . . directly addresses the question of state immunity, and authorizes suits against states or local governments for liability or contribution when such entities caused or contributed to the release or threatened release of a hazardous substance." U.S. Br. at 5-6.

Respondent candidly acknowledges that the 1986 amendments exempt state and local governments from liability only for property acquired involuntarily, and that the exemption "should not apply where the government in fact caused a hazardous release." Resp. Br. Opp. at 13. Respondent further acknowledges that the suit brought by Union Gas is based on affirmative state acts—"not the sort of involuntary acquisition contemplated by the amendments to CERCLA." Resp. Br. Opp. at 13 n.4.

Respondent continues to defend the decision below on the grounds that the amended statute still does not refer to the Eleventh Amendment by name, an argument that falters in the face of other provisions enacted at the same time. For example, the 1986 CERCLA amendments add a new and separate provision allowing private citizen enforcement actions against states, but "only to the extent permitted by the Eleventh Amendment." Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, §206(a)(1) (see Cong. Rec. H9060). No such limit appears in the Section 107 liability provision cited by the United States and relied upon by Union Gas in this action. At least in the context of this statutory scheme, then, the lack of a reference to the Eleventh Amendment confirms Congress' intent to impose liability on the states.

As Union Gas argued in its petition, the question of state liability under CERCLA requires a clear and uniform answer. That answer having been provided by Congress, plenary review by this Court is not necessary. In such circumstances, this Court's practice is to grant certiorari, vacate the judg-

ment, and remand the case for further consideration in light of the new law. *Bureau of Economic Analysis v. Long*, 454 U.S. 934 (remanding for "further consideration in light the Economic Recovery Tax Act of 1981").

Union Gas therefore joins the United States in urging that the judgment below be vacated and the case remanded for reconsideration in light of the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499.

Respectfully submitted,

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